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No. 90-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

A. The Brief for the United States in Opposition ("G't Br.") to the certiorari petition treats this case as though an extension of the Special October 1984 Grand Jury was sought and obtained. On this pretext, it seeks to trivialize the issue presented by pretending that the absence of a written order was purely formalistic.

If that were this case, responsible advocacy would permit a credible argument in opposition to certiorari. But that is *not* the instant case, as the United States knows

full well, and the liberties it takes to mask the real issue and hide from this Court the facts of record are *not* responsible advocacy.

Our petition for certiorari—which the United States essentially recasts on the strength of assumed facts neither found below nor even arguably suggested by the record evidence—accurately states the circumstances leading to the fundamental jurisdictional flaw which the Government refuses to face: *i.e.*, that there was never any order entered, nor even an oral directive, extending the life of the October 1984 Special Grand Jury. That inescapable failure is not one which can be "papered over" after the fact so as to resuscitate a grand jury whose time has run.

We need not repeat here the legal arguments in our petition that compel this conclusion. What is needed, however, is a statement of the points that were either misstated or unstated in the Government's opposition—points that underscore why the jurisdictional error committed below should, in the interest of justice and of preserving the integrity of the judicial process, be reviewed and corrected by this Court, rather than being brushed aside as nothing more than a "troubling" but unimportant technical failure (as the United States urges). To this end, we note the following:

1. The Special October 1984 Grand Jury was never extended, by judicial order or otherwise.[1]

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[1] Petitioners seek review, *inter alia*, of the Seventh Circuit's holding that a judge's uncommunicated mental determination that a grand jury has not finished its business may suffice to extend a grand jury. Petitioners contend that, even under the Seventh Circuit's tortured reading of the governing statute, 18 U.S.C. §3331(a), that determination never occurred. No evidentiary hearing has been permitted on this point.

2. Petitioners have a record of every single appearance of the Grand Jury before Judge McGarr during the relevant time period. No extension order was ever requested, considered or entered. The Government's inference of a possible unrecorded Grand Jury appearance before Judge McGarr in March 1986 (G't Br. 9 n.10) is not supported by *any* evidence and was *never even suggested below.*

3. The Government relies heavily on a purported vote among the grand jurors to extend the Grand Jury's term. G't Br. 6 n.4, 7, 8. Not only is this a contested evidentiary matter that has never been presented to a trier of fact, but, even if true, there is no indication whatsoever that any such vote (if it did indeed occur) was ever communicated to Judge McGarr. To the contrary, in February 1987, when the Government realized that no extension order had been sought, it reassembled thirteen former members of the Grand Jury as part of its "*nunc pro tunc*" strategy. The Government obtained affidavits from only three of those grand jurors. Significantly, these affidavits do *not* state that the Grand Jury appeared before Judge McGarr, at the time of the alleged vote or any time thereafter, to inform him of the alleged vote or to otherwise seek an extension. Moreover, ten grand jurors had absolutely no recollection of ever appearing before Judge McGarr for an extension.[2] For this evidence to be treated in so muddled a fashion in the Government's brief is most disturbing and is hardly fair or helpful to this Court.

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[2] Compare these *facts* with the misleading language of the purported *nunc pro tunc* order: "The foreman and other members of the Special October 1984 Grand Jury recall that they appeared before this Court in March 1986, and that at that time this Court extended the Grand Jury's term of service." Pet. App. 51-52.

4. Equally troubling is the Government's reliance on the "*de facto* officer" doctrine. G't Br. 9 n.10. Its use of that doctrine in the present context is completely at odds with the law in other circuits. For example, the Second Circuit has specifically held that a "grand jury is a creature of statute and that there can be no such thing as a *de facto* grand jury." *United States v. Macklin*, 523 F.2d 193, 195 (2d Cir. 1975) (citations omitted). *See also United States v. Armored Transport, Inc.*, 629 F.2d 1313, 1316 (9th Cir. 1980).

5. The Government's reliance on *United States v. Taylor*, 841 F.2d 1300 (7th Cir. 1988) (G't Br. 5, 6, 8-10) is also badly misplaced. *Taylor* was not concerned with the threshold question at issue here regarding the Government's belated and surreptitious procurement of Judge McGarr's *nunc pro tunc* order. Rather, the *Taylor* court assumed the *nunc pro tunc* order to be valid since the issue here had not been raised in *Taylor*, and thus determined that Judge McGarr's judicial order could be treated as "reliable and unequivocal" evidence of the Grand Jury's extension. *Taylor*, 841 F.2d at 1308.

As acknowledged below by the Seventh Circuit, the adequacy of Judge McGarr's "order" was simply not confronted in *Taylor*. *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990), Pet. App. 3-5. *Id.* When that issue was first confronted in this case, the Seventh Circuit ruled—as indeed is must—that Judge McGarr was utterly without jurisdiction when he signed the Government's ghostwritten *nunc pro tunc* "order" and that the so-called "order" was "not really an order" at all. *Daniels*, 902 F.2d at 1241, Pet. App. 3. Consequently, there is not now, nor was there ever, any order extending the Special October 1984 Grand Jury.

B. Only a brief comment is needed on the second question presented. The Government attempts to minimize the certworthiness of this issue by portraying the Metropolitan Correctional Center's interception of Petitioner Daniels' telephone calls as "random monitoring." G't Br. 3, 10. The MCC monitored none of Daniels' telephone calls until they received informant information regarding Daniels' use of the MCC telephones. Immediately following their receipt of this information, MCC officials conducted a lengthy and focused campaign to intercept all of Daniels' telephone calls without a warrant. If such conduct by the MCC falls within the Government's and the Seventh Circuit's definition of "random monitoring in the ordinary course of duty," then the "ordinary course" exception to Title III's warrant requirement has indeed engulfed the rule.

CONCLUSION

The Special October 1984 Grand Jury was never extended. Then-chief Judge McGarr was not even aware of a need to extend the Grand Jury's term before it expired in March 1986. One year after the Grand Jury's term had expired, the Government manufactured false evidence in an attempt to avoid the consequences of its mistake. The Government now suggests this is an unimportant issue not worthy of this Court's review. The Government is wrong. The District Court had no jurisdiction over Petitioners. The Government "backdoored" a senior judge (now retired) who had no case pending before him and obtained a false "order" which Government attorneys presented as binding to the judge to whom Petitioners' case *was* assigned. In the Seventh Circuit, the Government's

attorneys argued that potentially hundreds of defendants might be affected. Now they say this case stands alone. G't Br. 10. Never do they say they are proud of what they did.

The conduct under scrutiny so fundamentally undermines the integrity of the criminal justice system by countenancing a *post hoc* "fix" of an obvious jurisdictional failure that it must not escape plenary review of this Court. Law and circuit court precedents are clear about what is required to extend the life of a grand jury. Nowhere do they permit the course followed by the prosecution here. A grant of certiorari is therefore compelled.

In addition, the Government's interception of Petitioner's telephone calls cannot be squared with *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979). Supreme Court review of the lower court's denial of Petitioners' suppression motion is therefore necessary to resolve this conflict in the circuits.

Respectfully submitted,

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